Supreme Court, U.S.
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No. 97-177

In The

Supreme Court of the United States

October Term, 1996

BEN ADAMS and PHILIP JACKSON,

Petitioners,

versus

THE CITY OF JERSEY CITY,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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STATEMENT OF THE CASE

The Jersey City Police Department has operated under a Collective Bargaining Agreement with its members for many years. Traditionally, the Agreements provided that individuals designated as "detectives" received a stipend above their normal salaries. (Pet. App. 37). In most years, this stipend amounted to less than $2,000. (Pet. App. 32). The title "detective" is not one recognized by the New Jersey Civil Service Commission. It has been described as a "job assignment," not as a rank.

On July 7, 1989, Richard Harrison, as chief of the Jersey City Police department, issued a General Order terminating the salary differential paid to detectives. Philip Jackson and Ben Adams filed a two-count complaint, in count one, alleging that both plaintiffs had been denied a property interest in receiving Detective's pay. (Pet. App. 11). The second count of the Complaint alleged that Jackson was assigned inappropriate activities without procedural due process. (Pet. App. 11).

At the time of Chief Harrison's Order, Adams was assigned to the Administrative Planning Division where he worked on the department's computer system. He had been designated as a "detective" on May 17, 1976. Jackson was assigned to the Police Academy as a firearms instructor. He had been designated "detective" on June 20, 1984. Neither appointment was done by a resolution of the City Counsel or with the consent of the state civil service commission.

The elimination for the pay differential for detectives was the subject of several grievances filed by the Police Officers Benevolent Association on behalf of its members.

The State Board of Mediation held a hearing on January 3, 1990 which was presided over by Jeffrey B. Tener as arbitrator. The opinion issued by Mr. Tener summed up all of the arguments that had been advanced by the City and the grievants. A good deal of time was spent by the arbitrator on the issue of the "detective" title.

Mr. Tener was convinced that the question of who should receive detective pay was one that could only be answered by examining the function that the officers performed. Consequently, he found that only officers assigned to the Investigation Unit and Special Investigations were entitled to the pay differential. This decision was confirmed by the Superior Court of New Jersey in an Order signed by Judge Robert Tarleton on May 31, 1990. Under the terms of this Order, neither Adams nor Jackson (who were both assigned to the Administrative division) were entitled to receive the pay differential.

The George Act, N.J.S.A. 40:174-148 was enacted in 1920. (Pet. App. 32). The Act was repealed by N.J.S.A. 40A:61-8, effective January 1, 1988. *Id.* The George Act required that a "detective" be appointed by a resolution of the governing body of the municipality. *Id.* Neither Adams nor Jackson was ever appointed by such a resolution. The "LaBate Grievance" cited by the appellants has no place in the instant case. LaBate complained of his assignment to a "non-investigative" position. The appellants were free to do the same under the non-contractual procedure set forth in the Collective Bargaining Agreement. Neither Adams or Jackson filed such a grievance. LaBate did file a grievance and subsequently was reassigned to "investigative" duties.

The appellants' position that they held "permanent promotions to detective" finds no support in the law of the State of New Jersey. Neither Adams nor Jackson met the threshold requirement of having been appointed by **resolution** of the governing body. No detective in Jersey City was appointed this way. As described at length in the arbitration decision, the City considered the position of detective to be an assignment, not a rank. Reference to the decision in *Perez v. Cucci*, 725 F.Supp. 209 (D.N.J. 1989) aff'd, 898 F.2d 142 (3rd Cir. 1990) has no bearing on the case at bar as Petitioners make no claim that they were singled out on the basis of their political affiliation. Under the Article 24B of the terms of the Collective Bargaining Agreement between the City of Jersey City and the Police Officers Benevolent Association (POBA), of which Adams and Jackson were members, individual officers were afforded the right to institute grievance procedures. (Pet. App. 34). Neither Ben Adams or Philip Jackson availed themselves of this right, declining to bring or join any grievance of the General Order.

In his decision granting Summary Judgment to the City, Judge Ackerman, U.S.D.J., noted that only Count I of Petitioner's Complaint, concerning elimination of pay differential without notice and hearing remained for decision. (Pet. App. 11). Count II of the Complaint, in which Petitioner Jackson alleged that his transfer to patrol duties without hearing violated due process requirements, had been waived by Jackson's failure to set forth any facts regarding that claim in the Revised Final Pretrial Order. (Pet. App. 11).

ARGUMENT

I. THE DECISION BELOW AFFORDED COMPLETE REVIEW OF COLLECTIVE BARGAINING GRIEVANCE/ARBITRATION PROCEDURE AND FOUND FULL COMPLIANCE WITH CONSTITUTIONAL REQUIREMENTS FOR DUE PROCESS.

A. THE COURT BELOW APPLIED THE CRITERIA ESTABLISHED BY THE SUPREME COURT IN *MATTHEWS V. ELDRIDGE*, 424 U.S. 319, 96 S.CT. 833, 47 L.Ed.2d 18 (1976) IN DETERMINING THAT BEN ADAMS AND PHILIP JACKSON HAD BEEN AFFORDED DUE PROCESS.

Although Petitioners frame their petition for certiorari as one involving the preclusion of federal jurisdiction by an arbitration proceeding under a collective bargaining agreement, no such issue is presented in the instant matter.

The underlying complaint brought by Petitioners, Ben Adams and Philip Jackson, contained two counts. In the first cause of action, both petitioners alleged that elimination of the pay differential, without notice and hearing, constitues a deprivation of property without due process. (Pet App. 11) The claim for detective pay was based on a salary schedule established by the terms of the collective bargaining agreement (Pet. App. 37).

Petitioner's pay differential was terminated by General Order of Jersey City Police Chief, Richard Harrison on July 7, 1989, which eliminated the salary differential for all "Detectives" effective July 8, 1989. In addition, the assignment of detective was rescinded by General Order #20-88, which substituted the title of Investigator, and

provided the relevant job description. Following the General Orders, several grievances were filed by the Police Officer Benevolent Association on behalf of their members. The matter was arbitrated, pursuant to the procedure established by Article 24 of the collective-bargaining agreement (Pet. App. 34-36) by the New Jersey State Board of Mediation. One of the issues considered by the arbitrator, Jeffrey B. Tener, was who was entitled to a pay differential for performing the investigative work previously performed by detectives. The arbitrator, after hearing both sides, determined that the important consideration is the work performed and the compensation. The arbitrator determined that only officers performing investigative functions (i.e., with responsibility for crime scenes and continuing investigation) were entitled to receive the pay differential. These were officers assigned to the Investigation and Special Investigation Units. The arbitrator's decision was confirmed by the New Jersey Superior Court in an Order signed by Judge Robert Tarleton on May 31, 1990. Neither of the Petitioners had filed a grievance over loss of assignment or pay. By the terms of the arbitration award, neither of the Petitioners was entitled to differential pay.

Petitioners subsequently filed suit claiming they had been deprived of their property interest in receiving detective's pay (First Cause of Action), (Pet. App. 11) and that Officer Jackson had been deprived of his property interest in assignment to duties commensurate with his rank. (Second Cause of Action), (Pet. App. 11)

Petitioners complaint was heard by the Honorable Harold A. Ackerman, U.S.D.J. who granted the City's Motion for Summary Judgment by Order dated July 16,

1996. (Pet. App. 3) Judge Ackerman determined that the City had not violated due process in depriving officers Adams and Jackson of their property interest in a salary differential. (Pet. App. 21) In arriving at his decision, Judge Ackerman considered whether the grievance procedures used to determine which officers were entitled to a salary differential met the criteria established in *Dykes v. Southeastern Pennsylvania Transportation Authority*, 68 F.3d 1564 (3rd Cir. 1995), *cert. denied*, 116 S.Ct. 1434 (1996) for review of collective bargaining grievance procedures. (Pet. App. 19)

Petitioner alleges that in *Dykes*, the Third Circuit created a presumption that grievance arbitration procedures established by municipal collective bargaining agreements meet all constitutional requirements. This allegation constitutes a gross misstatement of both the holding in *Dykes*, and Judge Ackerman's application of the *Dykes* holding to the instant matter.

In *Dykes*, the court explicitly recognized that the collective bargaining grievance procedure must satisfy the balancing test used by the Ninth Circuit in *Armstrong v. Meyers*, 964 F.2d 948 (9th Cir. 1992) and established by the Supreme Court in *Matthews v. Eldridge*, 424 U.S. 319, 334-335, 96 S.Ct. 833, 903, 47 L.Ed.2d 18, ___ (1976). The *Dykes* court reviewed the procedure available to Dykes including his recourse to state court action against his union for breach of duty of fair representation. *Dykes*, 68 F.3d at 1571. The *Dykes* opinion clearly stated that "where an *adequate* grievance/arbitration procedure is in place and is followed, a plaintiff has received due process to which he is entitled under the Fourteenth Amendment" *Dykes*, 68 F.3d at 1564. (emphasis added). Similarly the

Court noted that, "In so holding, we re-confirm our agreement with the many courts holding that grievance procedures outlined in collective bargaining agreements *can* satisfy due process requirements. *Id.* at 1572, n.6 (emphasis added). Nothing in the *Dykes* holding creates a presumption, as alleged by Petitioners, that all municipal grievance procedures established by a collective bargaining agreement satisfy constitutional requirements, and obviate the need for case-by-case review.

In applying the *Dykes* holding to the case at bar, Judge Ackerman determined that the *Matthews* criteria has been met by the collective bargaining procedure available to Adams and Jackson. (Pet. App. 19-20). Petitioners were thus afforded full review by a federal court of the process afforded to petitioners by the terms of the City's collective bargaining agreement.

B. THE CLAIMS OF BEN ADAMS AND PHILIP JACKSON CONCERNING DENIAL OF DUE PROCESS WERE DETERMINED IN A FEDERAL FORUM AND WERE NOT FORECLOSED BY THE COLLECTIVE BARGAINING GRIEVANCE/ARBITRATION PROCEDURE.

Nothing in the decision rendered by Judge Ackerman as upheld by the Court of Appeals holds that arbitration under a collective bargaining agreement forecloses or determines federal statutory or constitutional claims. In fact, the district court and Court of Appeals decisions below reviewed and decided Petitioners' § 1983 claims. The gravamen of Petitioners' complaint is that they were deprived of a property interest without due process of law in violation of the Fourteenth Amendment. In other

words, the *process* available to Petitioners to resolve their claims is the basis of the suit. Petitioners, Adams and Jackson, were not denied a hearing on the constitutionality of the process. The decisions below applied the criteria required by the Supreme Court in *Matthews v. Eldridge*, 424 U.S., 319, 96 S.Ct. 833, 47 L.Ed.2d 18 (1976), and found that the Petitioners had not been denied due process.

Petitioners have misapplied the decisions in *McDonald v. West Branch*, 466 U.S. 284, 104 S.Ct. 1799, 80 L.Ed 302 (1984), *Pryner v. Tractor Supply Company*, 109 F.3d 354 (7th Cir. 1997), *Gilmer v. Interstate*, 500 U.S. 20, 111 S.Ct. 1647, 144 L.Ed.2d 26 (1991) and *Alexander v. Garden-Denver Co.*, 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974) and its progeny. These cases all consider, on various factual bases, the role of grievance/arbitration procedures in determining employee's complaints based on federal statutory or constitutional rights. No decision was made by *an arbitrator* that the arbitration/grievance procedure available to Petitioners comported with constitutional requirements. That determination was made by Judge Ackerman and upheld by the Court of Appeals. There is no conflict between the decision rendered on Officers Adams and Jackson complaints with the cases cited by Petitioners. These case would be relevant *only if* a determination had been made by an arbitrator that the procedures established by the controlling collective bargaining agreement met constitutional muster. No such claim was brought before the arbitrator, and no such opinion was rendered by him. As Judge Ackerman stated in his decision, "[T]he role of the grievance/arbitration procedures is not to determine whether or not plaintiffs

have been afforded due process. Rather, the roles of the grievance/arbitration procedure is to afford plaintiffs with due process" (Pet. App. 21).

Petitioners were not denied appropriate review of the process to ascertain compliance with due process requirements. Officers Adams and Jackson were afforded a considered determination in the federal courts that the collective bargaining agreement available to them (which they declined to utilize) provided due process of law in determining their loss of salary

In Count II of the complaint, Officer Jackson alleged that the City had transferred him to patrol duties in October, 1989, without a hearing depriving him of property without due process of law. (Pet. App. 11). Judge Ackerman decided that Officer Jackson had failed to set forth in the Pretrial Order any facts he intended to prove regarding such claim and thus had waived that claim. (Pet. App. 11). Officer Jackson's complaint of denial of due process in reassignment to patrol duties was not foreclosed by arbitration – it was waived by his own failure to prosecute the claim.

Finally, Petitioners seem to argue that their complaint evidences a conflict between individual rights and the interest of collective representation. There is no such conflict evidenced by the facts of this case. Pursuant to the terms of collective bargaining agreement at issue herein, the Petitioners were given full access to the grievance/arbitration procedure in Article 24. The agreement provides in Article 24, Section B Definition:

> The term "grievance", as used herein, means any controversy arising over the interpretation

> or adherence to the terms and conditions of agreement and may be raised by any Police Officer or Association. (Pet. App. 34)

Therefore, unlike the plaintiff in *Pryner v. Tractor Supply Co.*, 109 F.3d 354 (1997), Petitioners were empowered by the contract to bring grievances on their own behalf. The court in *Pryner* noted in arriving at its decision, "Most important, the grievance and arbitration procedure can be invoked only by the union and not by the worker." *Id.* at 362. Thus, no tension existed here, as in *Pryner*, between Petitioners' rights and the Union's interest. Petitioners' arguments to the contrary are a clear misstatement of the facts of this case.

II. PETITIONERS HAVE NOT BEEN DEPRIVED OF A PROTECTED PROPERTY INTEREST WITHOUT DUE PROCESS BECAUSE PETITIONER JACKSON WAIVED HIS JOB TENURE CLAIM FOR FAILING TO COMPLY WITH JUDGE ACKERMAN'S PRE-TRIAL ORDER.

In count one of the Complaint, both Petitioners alleged that the Respondent eliminated the premium pay differential without due process. (Pet. App. 11) In count two of the Complaint, Petitioner Jackson asserted that his reassignment to patrol duties constituted a deprivation of a property interest without due process of law. (Pet. App. 11). On May 8, 1996, Judge Ackerman held that Petitioner Jackson waived count two of the Complaint because he failed to comply with the Revised Final Pretrial Order requiring him to set forth the facts that he intended to prove at trial. (Pet. App. 11). Consequently, Judge Ackerman decided only the issue of whether the Petitioners

were denied due process on the pay differential claim. (Pet. App. 12).

Petitioners now erroneously claim that the lower courts denied Petitioner Jackson due process by failing to provide a hearing on the merits for a claim that he waived. Petitioners' claim of a Catch 22 situation is an attempt to mischaracterize the facts to obtain another chance at reviving his waived claim.

As to whether the Petitioners were denied a hearing on the merits on their pay differential claim, Judge Ackerman wisely applied the three part test[1] of *Matthews v. Eldridge*, 424 U.S. at 335, to whether the grievance/arbitration procedures available to Petitioners comported with due process. (Pet. App. 14-21). In his opinion, Judge Ackerman noted that the Third Circuit recognized in *Dykes v. Southeastern Pennsylvania Transportation Authority*, that grievance/arbitration procedures contained in a CBA may satisfy due process requirements. (Pet. App. 15). Applying the three-part *Matthews* test, the district court found that similar to the situation in *Dykes*, the private interest at issue was not very significant, multi-level grievance procedures were available and that unlike

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[1] Three factors must be considered when deciding whether a particular procedures satisfies due process: "First the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Matthews*, 424 U.S. at 335.

Dykes, the Petitioners did not claim their Union failed to advance their interests. (Pet. App. 19-20). Furthermore, Petitioners could have filed a grievance without the assistance of their union and their failure to pursue the matter was the cause of any deprivation of due process. (Pet. App. 20). Moreover, the district court found that although Petitioners did not file grievances, their union did arbitrate the pay differentials. The union successfully won reinstatement of back pay for individuals performing investigative duties, but since both Petitioners were not performing investigative duties, they were not entitled to back pay. (Pet. App. 20).

Finally, Petitioners assert that because the arbitrator did not address the issue of job tenure and Respondent's admission that the tenure claim could only be resolved judicially, they have been denied due process. (Pet. Cert. 25). Petitioners, however, fail to advise the Court that Petitioner Jackson waived this claim through his inability to comply with the Pretrial Order. Consequently, the Petitioners have not suffered a deprivation of due process.

CONCLUSON

Petitioners were not foreclosed by an arbitration decision from obtaining a determination in the federal court that they had been afforded due process in deprivation of a salary differential. Petitioners' claims of violation of due process were fully reviewed by the Honorable Harold A. Ackerman, U.S.D.J. who determined that Petitioners had suffered no due process violation. This decision was upheld by the U.S. Court of Appeals for the

Third Circuit. Petitioner Jackson's claim of violation of due process by assignment to patrol duties was waived by his failure to set forth any facts in proof of the claim.

For these reasons, the Court should deny Ben Adams and Philip Jackson's Petition for Writ of Certiorari.

Respectfully submitted,

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